No. 06-1428

In The Supreme Court of the United States

JOHN F. KNIGHT, JR.,
and ALEASE S. SIMS, ET AL.,

Petitioners,

v.

THE STATE OF ALABAMA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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INTRODUCTION

Respondents argue that the petition for writ of certiorari should not be granted because it presents only "fact-bound" questions that are not of "national importance." Br. in Opp. 3-4. To begin with, respondents mischaracterize the issues presented by the petition as an attack on findings below that there was "no evidence of causation or redressability." *Id.* at 3. To the contrary, the petition does not refer to the record of evidence; it relies entirely on the lengthy findings of fact made by the District Court, App. 34-93, and contends that they do not justify conclusions of law 13-17 holding that the causal relationship between the challenged property tax provisions in Alabama's constitution and the unequal educational opportunities for African Americans that were the hallmark and purpose of the dual system is too attenuated to satisfy *United States v. Fordice*, 505 U.S. 717 (1992). App. 97-98.[1]

The District Court made findings of fact that the state constitutional limits on property taxes force Alabama's K-12 schools and higher education to share the same Education Trust Fund (ETF) revenues, App. 81-86, that the income taxes and sales taxes that supply the ETF are

[1] In its conclusions of law, when the District Court found there was an attenuated relationship between the tax structure and "school choice," it seemed to restrict the meaning of "school choice" to the choice about *which* college to attend and not the choice *whether* to attend and to complete higher education at any college at all. App. 98-99 n.9. However, when Plaintiffs' motion to alter or amend contended that such a cramped construction of *Fordice* would be legally erroneous, the District Court clarified its ruling and stated that it "reached its conclusion based on the Knight-Sims Plaintiffs' failure to show that the ability of black students to attend college, *or* to choose a particular institution of higher education, has been unconstitutionally stymied by the property tax system." App. 107 (emphasis added).

already regressively high and cannot compensate for Alabama's nationally lowest property taxes, App. 69-70, 72, 81, that overall low revenues cripple both K-12 and higher education, App. 72, 96, and that this inadequate funding falls disproportionately on black students,[2] just as the racially motivated drafters of the state constitution intended. App. 72-80, 84, 87-93. The petition further contends that the detailed findings of fact that the tax provisions were racially motivated and still have the intended racially discriminatory effects should have prevented the District Court from "declin[ing]" the class representatives' request to enjoin their future enforcement on grounds that such a prohibitory injunction "is beyond the scope of this litigation." App. 106.

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[2] Respondents refer to data from defendants' 2004 annual report to the court showing black degree completions increasing by 96% from 1991 to 2003, while white degree completions dropped by 13%. Br. in Opp. 2 (citing App. 22). These data merely reflect corresponding changes in census demographics. According to the U.S. Census Bureau, the black population of Alabama in the age 20- to 25-year-old category increased 19.4% between 1990 and 2000, while the white population age 20- to 25-years old declined 7%. http://cber.cba.ua.edu/edata/census2000/cntybyraceadult.prn (last accessed on May 27, 2007). The census further shows that the percentage of black college graduates over 25 years of age increased from 9% in 1990 to 11% in 2000, while white college graduate percentages in the same age group increased even more, from 17% to 21%. U.S. Census Bureau, 1990 Census, Table P058, and U.S. Census Bureau, 2000 Census, Tables P148A and P148B (accessible through http://factfinder.census.gov) (last accessed on May 27, 2007). Of course, for equal protection purposes, the relevant question is the black-white gap, and the District Court found that the black-white enrollment gap actually increased over this period of time. App. 90. As the District Court pointed out, all demographic groups have raised their college graduate numbers because of increases in "what economists call the college wage premium, the difference between a high school graduate, what he or she earns, and a college graduate." App. 92.

Respondents' brief in opposition actually underscores the national importance of the question whether a federal District Court may simply ignore the clear constitutional violation established by its own findings of fact. Subsumed in this question are at least two subsidiary questions suggested by respondents' brief: whether any person may ever successfully challenge as racially discriminatory a state's tax laws, and whether eradication of Jim Crow-era laws that still adversely impact African Americans remains a Constitutional imperative.

I. NEITHER THE RESPONDENTS, THE DISTRICT COURT, NOR THE COURT OF APPEALS CAN JUSTIFY LETTING STAND THE RACIALLY DISCRIMINATORY STATE CONSTITUTIONAL PROVISIONS IDENTIFIED BY THE FINDINGS OF FACT.

The State respondents do not attempt to defend the reasons given by the lower courts for refusing to hold that the specific findings of fact establish a violation of the Fourteenth Amendment. The District Court held that, because it concluded the racially motivated tax provisions did not have continuing "classic" segregative effects on higher education within the meaning of *Fordice*, the traditional equal protection principles of *Hunter v. Underwood*, 471 U.S. 222 (1985), were "inapplicable under the circumstances of this case." App. 106. The Court of Appeals held that Rule 54(c), Fed.R.Civ.P., did not "empower" it or the District Court to enjoin the racially discriminatory tax provisions. App. 19-21 n.19. The petition for writ of certiorari presents the important question whether these reasons can be squared with the plain language of Rule 54(c) and a federal court's duty to order appropriate

relief where the facts clearly establish a constitutional violation. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65 (1979).

Respondents do not address these questions. Instead, they contend that the District Court could refuse to enjoin the racially discriminatory tax provisions as an exercise of its equitable discretion in fashioning a school desegregation remedy. Br. in Opp. 4-6. The problem with this argument is that the District Court held that the challenged state constitutional provisions "do not violate the Fourteenth Amendment." App. 102. It never reached questions of remedy and thus never exercised its remedial discretion.[3] The question of national importance here is whether,

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[3] Respondents wrongly imply that two years after its refusal to enjoin enforcement of these racially discriminatory property tax provisions the District Court included this decision in its final judgment approving settlement agreements and finding that vestiges of segregation in higher education had been eliminated to the extent practicable. Br. in Opp. 7 (*citing Knight v. Alabama*, 469 F.Supp.2d 1016, 1028 (N.D. Ala. 2006)). In fact, this final judgment was made "subject only to final resolution of the claims pending on appeal," 469 F.Supp.2d at 1037, and the settlement agreement between the Knight-Sims plaintiffs and the defendant State includes agreed upon remedy procedures if the property tax issue is remanded at the completion of all appeals. *See* CA No. 2:83-cv-01676-HLM (N.D. Ala.), Doc. 3469, pp. 19-20 (see pp. 12, 15-16 in the appendix to this reply brief).

Respondents also wrongly allege that the $10 million in need-based financial aid included in the settlement agreement has "served to break" any causal connection between the state constitutional property tax restrictions and their discriminatory effects. Br. in Opp. 9. In fact, the $10 million is only a one-time appropriation by the State, which has expressly refused to commit to continuing financial aid appropriations that the plaintiffs are left to pursue through the legislative process. CA No. 2:83-cv-01676-HLM (N.D. Ala.), Doc. 3469, p. 7 (pp. 4-5 in the appendix to this brief). Whether this Court grants the petition for writ of certiorari and reverses the decisions below may well determine whether there are sufficient future revenues to sustain and increase

(Continued on following page)

once they have made such damning fact findings, federal courts can evade their responsibility to declare a violation of the equal protection rights of the certified class of all black citizens of Alabama.

II. RESPONDENTS' READING OF THE DECISIONS BELOW SUGGESTS THAT THE REQUIREMENTS OF CAUSATION AND REDRESSABILITY WOULD BAR ANY FUTURE CHALLENGES TO THE RACIALLY DISCRIMINATORY PROPERTY TAX PROVISIONS IN ANOTHER CIVIL ACTION.

The State contends that this desegregation action is an inappropriate vehicle to secure relief from the racially discriminatory tax provisions in Alabama's 1901 constitution, and implies that black citizens who would benefit more directly from increased property tax revenues should bring a new lawsuit. At the same time, the State suggests that the rationale of the Court of Appeals, in particular regarding causation and redressability, arguably immunizes those tax provisions from any future attack. The State points out the difficulties other plaintiffs would have showing that an injunction against enforcement of the

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this modest financial aid appropriation that is well below the national average.

It is particularly disturbing that respondents have included these misleading representations in their brief in opposition to the instant petition when they successfully opposed petitioners' motion to supplement the record in the Court of Appeals with the District Court's final judgment and settlement agreements, on the ground that these matters were not before the District Court when it entered its 2004 ruling on the property tax issues. See docket entries for January 29, 2007, in Appeal no. 05-11527-BB (11th Cir.).

state constitutional restrictions on ad valorem taxes could result in higher revenues from taxes overall or could increase funding for "transportation, public safety, public health, . . . higher education *or something else*." Br. in Opp. 8 (emphasis added). What the state legislature might do in the future, they say, is "speculative, at best. . . ." *Id.* Because of these uncertainties, respondents suggest, any other black plaintiffs might not have Article III standing to assert "cognizable" claims against the racially discriminatory revenue provisions. *Id.* at 7. In short, if the decisions below are left standing, the State of Alabama can be expected to contend that these remnants of the dual system of education for blacks and whites are simply immune from judicial attack.[4]

Indeed, it will be hard for black plaintiffs in another lawsuit to improve on the specific findings of fact in the instant case. Respondents cannot deny that these findings of fact establish a direct line of causation between the challenged state constitutional provisions and the discriminatory financial burdens that fall disproportionately on black students in Alabama's system of public education, from kindergarten to graduate school. The provisions' adverse racial impact is not caused by private actors, as was the case in *Allen v. Wright*, 468 U.S. 737 (1984), but by the state action itself.

Respondents' primary contention is that a simple prohibitory injunction against future enforcement of the state constitutional tax restrictions would not redress any

[4] As the Court of Appeals noted, the Alabama Supreme Court has barred state courts from getting involved in challenges to the adequacy of funding for public education. App. 12 (*citing Ex parte James*, 836 So.2d 813, 816 (Ala. 2002)).

injury suffered by black Alabamians because the legislative response to such an injunction is unpredictable. But they do not dispute that removing the state constitutional barriers to the legislature addressing property tax reform in a plenary fashion is precisely what the white supremacist drafters of the Alabama constitution did not want to occur.[5] That is the root injury that would be remedied by the prohibitory injunction petitioners are seeking. In this respect, the instant action is no different than *Hunter v. Underwood*, where this Court's ruling striking from Alabama's 1901 constitution certain racially motivated provisions disfranchising misdemeanants provided no guarantee that the legislature would not re-enact them as statute law or propose them again to voters for inclusion in the constitution. *E.g., see Johnson v. Governor of Florida*, 405 F.3d 1214, 1223 (11th Cir.), *cert. denied*, 126 S.Ct. 650 (2005) (re-enactment of felon disfranchisement provision in Florida's 1968 constitution removed taint of racially motivated provision in the 1868 state constitution). Indeed, the same uncertainty about future legislative action inheres in every judicial order declaring a state law

[5] Respondents point to the 2003 referendum election cited by the Court of Appeals, App. 15, as "suggesting that Alabamians would be unwilling to raise property tax rates." Br. in Opp. 8. But they fail to point out the District Court's findings of fact that the voter referendum requirement for increasing property taxes was placed in the 1901 constitution for the racially discriminatory purpose of giving white voter majorities power to control all property tax increases and to provide "an important fall-back provision for guaranteeing the maintenance of white supremacy in majority black counties." App. 43-44. That is precisely what happened in 2003, where all nine of Alabama's majority-black counties, all of them located in the Black Belt, were among the thirteen counties which voted to adopt the constitutional property tax amendments in 2003. See http://www.sos.state.al.us/election/2003/scae/results.cfm (last accessed on May 29, 2007).

unconstitutional because of its racially discriminatory intent. Contrary to respondents' assertion, Br. in Opp. 11, the injunction in *Hunter v. Erickson*, 393 U.S. 385 (1969), against enforcement of a city charter amendment barring enactment through the ordinary lawmaking process of measures favoring the racial minority, without prior approval of a majority white electorate, did not ensure that the Akron City Council subsequently would adopt a fair housing ordinance. The District Court's attempt to distinguish *Hunter v. Erickson* from the instant case is simply mistaken. App. 100.

III. REMOVING INEQUALITY IMPOSED BY THE OFFICIAL REGIMES OF SLAVERY AND SEGREGATION IS OF HIGHEST NATIONAL IMPORTANCE.

Respondents do not contest the District Court's extensive findings of fact tracing the challenged state constitutional provisions to purposeful racial discrimination against former slaves and their descendants. They contend that whether these legal remnants of "an unfortunate era of Alabama's history" remain on the books is no longer of national importance. Br. in Opp. 7-8. Surely they are wrong, as this Court has often reminded us. *E.g., Palmer v. Thompson*, 403 U.S. 217, 220 (1971) ("History shows that the achievement of equality for Negroes was the urgent purpose not only for passage of the Fourteenth Amendment but for the Thirteenth and Fifteenth Amendments as well. *See, e.g., Slaughter-House Cases*, 16 Wall. 36, 71-72, 21 L.Ed. 394 (1873). Thus the Equal Protection Clause was principally designed to protect Negroes against discriminatory action by the States.").

As the District Court found, these racially discriminatory provisions in the 1901 Alabama constitution, by disproportionately restricting financial access for blacks to all levels of the state's system of public education, will continue to have their intended effect of "forcing African Americans into subordinate social and economic roles in the state's civil life," App. 91-92. The national importance of the issues presented by the petition could not be greater. By refusing to enjoin enforcement of these restrictions on the revenues that are the traditional source of funding for public education throughout the United States, the courts below lost sight of the crucial role federal courts must play in ending this country's "unfortunate era" of racial segregation, a task described eloquently in the District Court's 1991 opinion:

> The history of black higher education in Alabama following the Civil War is not atypical. Strict white control was the hallmark of black higher education in the state until the 1970's. For many years blacks were effectively denied the benefits of a collegiate education by the operation of two interrelated practices: the uncompromising segregation of the state's white institutions and the limited educational mission assigned to the state's black colleges. Concomitant to these two practices, there arose a host of policies and laws designed to institutionalize segregation while assuring the inferior status of black education. The case at bar is[,] in large measure, about identifying and eliminating those segregative policies and practices which survived federally mandated integration.
>
> These surviving policies and practices, referred to as vestiges of the *de jure* period of segregation, must be abolished root and branch if

> the mandate of the Constitution is to be satisfied. The obligation of the Court is to ensure that a student is free to choose any institution of higher education in Alabama unencumbered by the segregative practices which arose during the period of *de jure* discrimination.

Knight v. Alabama, 787 F.Supp. 1030, 1046 (N.D. Ala. 1991), *aff'd in relevant part,* 14 F.3d 1534 (11th Cir. 1994). Why the meticulous findings of fact made by the District Court in this matter do not trigger this solemn obligation is the issue that deserves careful review by this Court.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHN F. KNIGHT, JR., and **ALEASE S. SIMS**, et al., individually and on behalf of others similarly situated,	*	Civil Action No. 2:83-cv-1676-HLM
Plaintiffs and Plaintiffs-Intervenors,	*	
UNITED STATES OF AMERICA,	*	
Plaintiff-Intervenor,	*	
v.	*	
THE STATE OF ALABAMA, et al.,	*	
Defendants.	*	

SETTLEMENT AGREEMENT

(Filed Oct. 13, 2006)

This Settlement Agreement ("Agreement") is made by the following Settling Parties:

The Knight-Sims Plaintiffs; to wit, John F. Knight, Jr., and Alease Sims, et al., on behalf of themselves and the plaintiff class certified in this action as "all black citizens of Alabama and all past, present and future students, faculty, staff and administrators of Alabama State University and Alabama A&M University;"

The State Defendants; to wit, the State of Alabama, the Governor of Alabama, the State Finance Director, the Alabama Commission on Higher Education ("ACHE") and its members, and the Alabama Public School and College Authority and its members.

I

Guiding Principles

Removing the vestiges of segregation from Alabama's system of public higher education is the Pole Star that has guided the Settling Parties for the almost twenty-six years of this litigation. During that period, profound progress in attitudes, organization, and programs has been achieved. The State Defendants have complied with all remedial orders issued by the Court, resulting in the creation of new academic programs, diversity scholarships and endowment trusts and the construction of new facilities at Alabama State University and Alabama A&M University, the funding of efforts to increase African-American representation on the faculties and administrations of the historically white universities, and the allocation to date of over $248 million to implement these desegregation measures. The Settling Parties agree that this progress should continue. The Settling Parties further agree that continued progress does not depend on continued federal court supervision. The Settling Parties are prepared to show the nation and the citizens of Alabama that the elimination of discrimination in our society is a goal to which the Settling Parties are dedicated. It is in this spirit that the Settling Parties have reached this Agreement.

Applicable desegregation law requires the Court to determine that vestiges of segregation have been eliminated to the extent practicable and consistent with sound educational practices. By entering into this Agreement, the Knight-Sims Plaintiffs acknowledge that the State Defendants have satisfied this legal burden. Similarly, by entering into this Agreement, the State Defendants pledge to continue those efforts that, over the course of this litigation, redressed historical discrimination in higher

education against African-American citizens of this state. To that end, this Agreement's primary focus is on continuing to improve African American access to and participation in Alabama's system of public higher education.

The Governor, in his capacity as chief executive officer, and the Attorney General, in his capacity as chief legal officer, execute this Agreement on behalf of the State of Alabama and affirm their willingness to seek full implementation of the Agreement. As emphasized in section XIII below, the Agreement is subject to the approval of the District Court.

II

NEED-BASED FINANCIAL AID

1. A major priority of this Agreement is to raise the African-American entry rates to college, to narrow the gap between the rates at which African-American and white high school graduates enter college, graduate, and pursue graduate and first professional studies, and to increase access to higher education for all citizens of Alabama.

2. To that end, ACHE will alter the maximum grant allowed under the existing Alabama Student Assistance Program ("ASAP") from $2,500 per academic year to $5,000 per academic year, effective beginning Fall 2007 academic term. The term academic year will be as defined by the Administrative Procedures for the Alabama Student Assistance Program of the Alabama Commission on Higher Education.

3. Additionally, immediately upon final approval of this Agreement, the State Finance Director will transfer to the ASAP account $10,000,000.00 from the funds

sequestered by the order entered September 29, 2006, which will be used as follows:

a. ACHE may use an appropriate amount to cover costs relating to its administration of the ASAP program;

b. The distribution method of these funds and any other funds in ASAP will be in accord with Chapter 300-4-2, Alabama Student Assistance Program. The parties agree that this requirement does not, however, restrict the power of ACHE to amend this Chapter, through appropriate procedures, during the term of this Agreement.

c. The use of these funds must follow the normal procedures as established by the Alabama Commission on Higher Education. Institutions wishing to qualify for these funds must submit the required documentation no later than March 31, 2007. Distribution of these funds will start no earlier than the fall 2007 term.

d. In his budget recommendation to the Legislature, the Governor will request that the Legislature provide that these funds will not revert to the Education Trust Fund at the end of each fiscal year but shall be carried over in ASAP in subsequent years.

e. The $10,000,000 transfer shall be over and above any other funds ACHE currently receives for ASAP.

f. It is the Plaintiffs' intention through the legislative process to support future appropriations to ASAP with the goal of increasing it beyond $10 million, in amounts that will

continue substantially to reduce the cost of attending Alabama's public institutions of higher education for Alabama residents who qualify for federal need-based financial assistance but who still have unmet financial need. The State defendants support in general the goal of reducing financial barriers to access to higher education. However, they have made no binding commitment to continuing or increasing the financial aid provided herein.

g. To the extent reimbursements to Alabama State University and Alabama A&M University for Diversity Scholarships awarded to students "grandfathered" in the Diversity Scholarship program, as provided in Section III, below, for academic years during the term of this agreement fall below $2,000,000, the amount by which those reimbursements fall below $2,000,000 shall be transferred from the appropriation for *Knight v. State of Alabama* obligations to ASAP. As the amount of the transfer may not be known until late in the fiscal year, in his budget recommendation to the Legislature, the Governor will ask the Legislature to provide that the funds will not revert to the Education Trust Fund at the end of the fiscal year but shall be carried over in ASAP in the next fiscal year.

4. As and to the extent such information shall become available to ACHE, ACHE shall post on its website the following:

a. The average cost of attending public universities and postsecondary institutions in Alabama;

b. The total amount of Pell grants awarded to students at institutions of higher education in Alabama;

c. The amount of need-based financial aid awarded to students through the ASAP program, disaggregated by institution and by the number of students receiving ASAP financial aid;

d. A comparison of state need-based financial aid provided in Alabama with regional and national financial aid data, as available.

III

Diversity Scholarship Programs

Students for whom Alabama State University and Alabama A&M University were reimbursed for Diversity Scholarships awarded in academic year 2004-05 will be "grandfathered" as specified herein. Such reimbursements may continue for the term of this Settlement Agreement to the extent the "grandfathered" students remain enrolled at the same academic level (i.e., undergraduate, masters, or doctoral) as in academic year 2004-05. To the extent those students are awarded Diversity Scholarships by their institution in future academic years, to the extent those students remain at the same academic level as in 2004-05, and to the extent those scholarship awards would otherwise qualify for reimbursement by the State under the terms of the Remedial Decree, 900 F.Supp. at 356-8, the State shall reimburse the institutions for the scholarships awarded. Any claim by an institution for such reimbursement shall be submitted within 30 days of the completion of the academic term for which reimbursement is sought, with the following exceptions:

A. Claims for reimbursement for scholarships awarded in academic year 2005-06 shall be submitted within 30 days of the court's approval of this Agreement; and,

B. Claims for reimbursement for scholarships awarded during a summer term shall be submitted prior to September 1 of the year in which the scholarships were awarded. It is anticipated that the State's reimbursements for the Diversity Scholarship programs will be phased out during the term of this Agreement and that the State will have no obligation to reimburse any institution for Diversity Scholarships awarded after the termination of this Agreement, even if students have failed to achieve their degree by that date.

IV

Trusts for Educational Excellence

The State of Alabama will continue to fund the Trusts for Educational Excellence established by the Remedial Decree under the terms and for the duration established by the Decree, 900 F.Supp. at 349-356.

V

Programs Established by the Remedial Decree

To the extent continued funding of programs established at ASU pursuant to the Remedial Decree, 900 F.Supp. at 370-72, is required under existing Court order, the State will continue the separate line items to fund those programs as specified under those orders, for the duration of the period specified by the orders. At the end of the Court-ordered period of funding, those expiring line

items for programs listed in the "Knight v. Alabama – Financial Obligations" section of the Education Trust Fund Act will be rolled into ASU's base O&M appropriation for the fiscal year following the end of court-ordered funding, provided the program meets the post-implementation requirements.

For those funds in the Alabama State University, Board of Trustees section of the Education Trust Fund act identified as Title VI Program Enhancement Funds and Title VI Desegregation Planning funds, (hereinafter "Title VI Funds"), it is the intention of the Governor and the Knight Plaintiffs to support before the Legislature the inclusion of these Title VI Funds in ASU's O&M base during the fiscal year immediately following the end of the Court-ordered period of funding. The Legislature will retain its discretion to appropriate, or not appropriate, the Title VI Funds as part of ASU's O&M base. The Governor and the Knight Plaintiffs agree, however, that the inclusion of the Title VI Funds in ASU's O&M base will be important to the continued viability of the programs, provided the programs are meeting their post-implementation requirements. If, however, at the time the Court-ordered period of funding ends, a program fails to meet its post-implementation requirements, then there is no obligation to support before the Legislature the inclusion of the Title VI Funds for that program in ASU's O&M base.

The parties acknowledge that the Governor may veto any legislation, for reasons other than its inclusion of an appropriation to satisfy this paragraph, without being in breach of this Agreement. The request and support required of the Governor in this paragraph V is not intended to bind the Legislature in any respect, as such might

violate the separation of powers between the Executive and Legislative branches of government.

VI

Capital Funds for Alabama A&M University

Immediately upon final approval of this Agreement, the State Finance Director will transfer to the Alabama Public School and College Authority, for the benefit of Alabama A&M University, $7,300,000.00 from the funds sequestered by the order entered September 29, 2006. These funds shall be allocated to AAMU, consistent with APSCA guidelines and procedures, to meet existing capital funding needs of the University. This payment shall be over and above any other capital funds the University might receive, separate and apart from this Agreement or this litigation. These funds shall be spent on facilities that are directly related to instruction activities and/or research related to AAMU's historic mission. Within 45 days of transfer of these funds to APSCA, the University will present to the Plaintiffs, the Governor, the Finance Director, and ACHE, a plan for how these funds will be spent and a time-line for such expenditures.

VII

Capital funds for Alabama State University

1. Immediately upon final approval of this Agreement, the State Finance Director will transfer $25,800,000.00 from the funds sequestered by the order entered September 29, 2006, to the Alabama Public School and College Authority, for the benefit of Alabama State University. These funds shall be allocated to ASU, consistent with APSCA guidelines

and procedures, to be used to meet capital funding needs specified in this Court's order entered February 8, 2006. This payment shall be over and above any other capital funds the University might otherwise receive, separate and apart from this Agreement or this litigation. Within 45 days of transfer of these funds to APSCA, the University will present to the Plaintiffs, the Governor, the Finance Director, and ACHE, a plan for how these funds will be spent and a time-line for such expenditures.

VIII

Additional Capital Funds

The Governor has agreed to request and to support in the 2007-08 education budget an appropriation to Alabama State University of an additional $11,890,380.00 to be used to meet capital funding needs specified in this Court's order entered February 8, 2006, and an appropriation to Alabama A&M University of an additional $365,000.00 to be used for the purposes set forth in VI, above. If, however, these additional funds are made available through the Legislature authorizing a capital bond issue for education, then the parties agree that the Governor would not be required to request and support in the 2007-08 education budget an appropriation of these funds to satisfy the Court's order of February 8, 2006, or this Agreement. This appropriation or bond money shall be over and above any other capital funds the Universities might otherwise receive, separate and apart from this Agreement or this litigation. Any funds made available pursuant to this paragraph VIII shall be transferred to APSCA and allocated to the designated institutions consistent with APSCA guidelines and procedures. The parties acknowledge that the Governor may veto any

legislation, for reasons other than its inclusion of an appropriation to satisfy this paragraph, without being in breach of this Agreement. The request and support required of the Governor in this paragraph VIII is not intended to bind the Legislature in any respect, as such might violate the separation of powers between the Executive and Legislative branches of government.

IX

Dismissal of Appeal of Order of February 8, 2006

Upon final approval of this Agreement, the Settling Parties shall jointly file with the Court of Appeals a motion to dismiss the pending appeal and cross-appeal from this Court's order entered February 8, 2006.

X

Attorneys' Fees and Litigation Expenses

1. Immediately upon final approval of this Agreement, the State Finance Director will pay plaintiffs' attorneys' fees in the amount of $1,000,000.00 from the funds sequestered by the order entered September 29, 2006. Payment shall be made to James U. Blacksher, who shall be responsible for distribution of the fees to other plaintiffs' counsel.

2. Immediately upon final approval of this Agreement, the State Finance Director will pay into the registry of this Court $1,500,000.00 from the funds sequestered by the order entered September 29, 2006, as additional litigation expenses, which shall be disbursed as the Court may order.

3. The payments for attorneys fees and expenses made pursuant to this Section X shall be in complete satisfaction of any and all claims for fees or expenses by counsel for plaintiffs in this action and any appeals therefrom, except for the claims that will be severed from this action pursuant to Section XI.

XI

The parties have agreed that the issues pending resolution of the Knight-Sims plaintiffs' appeal from this Court's orders of October 5, 2004, and February 10, 2005, should be severed from this action on the following conditions that will pertain in the event said orders are reversed or vacated on appeal and remanded for further action by this Court:

The Knight-Sims plaintiffs have agreed that, to the extent any appellate mandate permits them to do so, they will seek only prospective relief; that is, they will ask the Court only to enjoin future enforcement of sections 214, 215, 216, 269 and amendments 325 and 373 of the Constitution of Alabama and the statutes that implement these constitutional provisions. Plaintiffs will ask the Court to defer entry of said prohibitory injunction for a reasonable period to allow State government the opportunity to enact replacement legislation and/or constitutional provisions. Plaintiffs will not ask the Court to invalidate any tax enacted prior to the ruling of the Appellate Court or to enjoin the imposition or collection of taxes thereunder.

XII

Matters Excepted from this Agreement

The Settling Parties agree that the following matters are excepted from this agreement and from dismissal of this action, as requested in Section XIII hereof:

Issues relating to African-American staff, faculty, and administration recruitment, hiring, and retention at HWIs. The Knight-Sims Plaintiffs may raise these issues with the Court and all Settling Parties are free to support or contest such issues and any ruling the Court might make; provided, however, that the Settling Parties agree to the following:

A. Funding to address any such issues should come from funds of the individual institutions, and not from new funds to be provided by the State; and,

B. ACHE should not be required to conduct any studies, fund any conferences, or publish any materials other than materials provided by the institutions in electronic form, which ACHE may publish on its web-site.

Should a ruling of the Court conflict with the agreements expressed in A or B, above, this Agreement shall become null and void, as provided in Section XIII(E) herein. Otherwise, any ruling of the Court on the issues of this paragraph may be appealed and such appeal will not affect the validity of this Agreement.

XIII

Dismissal of Action and Settlement Implementation

A. Preliminary Court Approval of Agreement.

Promptly after execution of this Agreement, but in no event later than 10 days after the execution of this Agreement, the parties by joint motion shall submit the Agreement to the District Court requesting that the Court enter an order granting preliminary approval of the Agreement. The District Court shall be requested to direct the giving of notice to the plaintiff class and to schedule a fairness hearing. In the event the Court declines preliminarily to approve the Agreement, or to find the Agreement provides an adequate basis for issuing notice and scheduling a fairness hearing, then the entire Agreement shall become null and void unless the parties promptly agree in writing to other mutually satisfactory settlement provisions and agree to proceed with the Agreement, subject to approval by the Court.

B. Final Judgment.

At the final hearing on fairness, adequacy, and reasonableness of the settlement as set forth in this Agreement, the parties, and each of them, agree to cooperate in good faith to achieve the expeditious approval of the settlement, and shall request the Court to grant final approval of the Agreement and to enter judgment thereon ("Judgment"). In order to satisfy the requirements of the Agreement, the Judgment must include, by specific statement or by reference to the Agreement to the extent permitted by law and the rules of court, provisions which:

1. Affirm certification of the proceeding as a class action pursuant to Rule 23 of the Fed. R. Civ. P. with the plaintiff class as previously defined by the Court;

2. Find that the notice given to class members satisfied the requirements of both Rule 23, Fed. R. Civ. P, and due process, and that the Court has jurisdiction over the class;

3. Find that the Agreement is fair, adequate, and reasonable in all respects;

4. Find that the class representatives, and all class members, have released all claims, all as set forth in the Agreement;

5. Order that the State shall implement the Settlement Agreement, including providing the funding designated in this Agreement;

6. Incorporate the Agreement within the Judgment to enable the District Court to exercise jurisdiction over any subsequent dispute involving the Agreement;

7. Pursuant to Rule 42(b), Fed. R. Civ. P., sever from this action the claims that are pending resolution of the Knight-Sims plaintiffs' appeal from this Court's orders of October 5, 2004, and February 10, 2005, denying plaintiffs' requests for relief based on said claims and those claims specified in Section XI, hereof;

8. Subject only to final resolution of the severed claims pending on appeal, find that on judicial approval of this Agreement, including the commitments contained herein, the State Defendants shall be in full compliance with the law, and that, therefore, there are

no continuing State policies or practices, or remnants, traceable to *de jure* segregation, with present discriminatory effects which can be eliminated, altered or replaced with educationally sound, feasible and practical alternatives or remedial measures; and, further, that this finding shall extend to all facets of the case and to all facets of public higher education in Alabama;

9. Subject only to final resolution of the claims pending on appeal, severed, or specified in Section XI, hereof, dismiss on the merits and with prejudice (i) all claims against the State Defendants set forth in the complaint, as amended, (ii) all claims against the State Defendants set forth in the complaint-in-intervention, and (iii) all claims of racial discrimination against the State Defendants asserted before the Court throughout the pendency and trials of the action including, without limitation, claims of system or institutional aspects, features, policies and practices alleged to be remnants of the *de jure* system.

C. Finality and Term of Agreement.

This Agreement shall become final upon the occurrence of the following events: (i) approval of the Agreement in all respects by the District Court as required by Rule 23(e) of the Fed. R. Civ. P.; and (ii) entry of the Judgment as provided for above.

Except where longer periods explicitly are prescribed, the term of the provisions of this agreement shall be from the date this Agreement becomes final until September 30,

2011, at which time this Agreement shall terminate. The Agreement shall be binding upon the successors and assigns of the parties and shall inure to their benefit.

D. Enforcement.

Should any dispute arise regarding a party's compliance with this Agreement, the Parties shall mediate that dispute before Carlos Gonzalez in an effort to reach resolution. Should Mr. Gonzalez not be available to mediate such dispute, the Parties shall select a mediator by mutual consent. All costs of mediation shall be shared equally by the Parties to the dispute. If mediation fails to resolve the dispute to the satisfaction of the Parties, the Parties, including all class members, irrevocably submit to the exclusive jurisdiction of the United States District Court for the Northern District of Alabama any suit, action, proceeding or dispute arising out of or relating to the Agreement (including any alleged nonperformance of the Agreement or the Judgment) or to the applicability of the Agreement. All parties agree that the District Court has complete jurisdiction and power to enforce this Agreement. The parties, agree, however, that they waive any right to seek additional funding or relief not provided in this Agreement. The parties intend by this paragraph to vest the District Court with full jurisdiction for enforcement as contemplated by the case of *Kokkonen v Guardian Life Ins. Co.,* 511 U.S. 375 (1994).

E. Effect of Non-Approval, Cancellation and Termination of Agreement.

If the District Court does not enter an order preliminarily approving settlement, or does not enter the final

Judgment contemplated by this Agreement, then the Agreement shall be automatically canceled and terminated unless the parties hereto otherwise agree at such time.

If the Agreement is not approved or is canceled or terminated, or fails to become effective for any reason, then the parties to the Agreement shall each be deemed to have its or their respective status as of the date and time immediately prior to the Agreement, and the parties shall proceed in all respects as if the Agreement and any related orders had never been executed or entered.

Dated: October 13, 2006,

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